Supreme Court, U.S.
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No. 98-1529

In The

SUPREME COURT OF THE UNITED STATES

HESTER INDUSTRIES, INC.,

Petitioner,

vs.

TYSON FOODS, INC.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

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Petitioner, Hester Industries, Inc. ("Hester"), hereby files this reply brief to respond to three new points in the opposition brief submitted by Tyson Foods, Inc. ("Tyson").

First, Tyson improperly argues on page 8 that "this case is not final and is not ripe for review by this Court." This statement is incorrect because the contempt issue is a final judgment and the remand to the district court is limited to the non-contempt causes of action asserted by Hester.[1] Thus, the decision of the Second Circuit is final and the contempt issue will not be considered on remand.

For this reason, the three decisions cited at page 8 of Tyson's opposition brief are inapposite. For example, *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967), specifically notes that the contempt issue decided by the court of appeals was remanded to the district court so that the district court will "consider whether there had in fact been a contempt." Similarly, the decisions in *Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993), and *American Constr. Co. v. Jacksonville*, 148 U.S. 372, 384 (1893), were not final because they involved issues that (a) would be reviewed by the district court on remand or (b) involved only interlocutory injunctive orders.

Second, Tyson misrepresents Hester's Petition by arguing at page 8 that "Hester does not even mention the

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[1] Tyson falsely states in its opposition brief (e.g., at 2 and 3 n. 1) that Hester "abandoned" all claims other than the contempt claim at trial. This false statement is demonstrated by the post-trial briefs of Hester and Tyson, that address the other five causes (breach of contract, trademark infringement, trademark dilution, misappropriation/unfair competition and tortious interference) either directly or by incorporation of pre-trial briefs.

standards for granting a writ of certiorari, let alone satisfy them."

To the contrary, Hester repeatedly addressed this standard in its "Question Presented" and throughout its Petition. In brief, Hester submits that its Petition relates to an important federal question and that the decision of the Second Circuit is contrary to both this Court's decision in *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994), and to the decisions of several other courts of appeal. A two paragraph summary of this position is set forth on pages 6-7 of the Petition.

More specifically, the parties incorporated their settlement agreement into the 1992 Dismissal Order by both referring to the agreement in the Order and by attaching the settlement agreement to that Order. In addition, by a transmittal letter prepared by counsel for a co-defendant of Tyson and with Tyson's admitted knowledge, all of the parties expressly requested the district court to review, approve and enter the Dismissal Order, that incorporated the attached settlement agreement.[2] (Pet. at 106a).

As this Court is well aware, *Kokkonen* states that the district court's jurisdiction and contempt power exist if either the settlement agreement is incorporated into the order or the court retains jurisdiction over the agreement. *See Kokkonen*, 511 U.S. at 381. Specifically, this Court stated:

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[2] Tyson erroneously argues at page 5 of its opposition brief that this transmittal letter "was never admitted into evidence." This is flatly wrong because the transmittal letter was submitted by Hester as an attachment to its summary judgment motion to hold Tyson in contempt of court. This motion was granted by Chief Judge McAvoy's Order of August 8, 1994 (Pet. at 14a-23a). There simply is no support for Tyson's argument that the letter was not admitted into evidence.

> But the only order here was that the suit be dismissed, a disposition that is in no way flouted or imperiled by the alleged breach of the settlement agreement. The situation would be quite different if the parties' obligation to comply with the terms of the settlement agreement had been made part of the order of dismissal – either by separate provision (such as a provision "retaining jurisdiction" over the settlement agreement) or by incorporating the terms of the settlement agreement in the order. In that event, a breach of the agreement would be a violation of the order, and ancillary jurisdiction to enforce the agreement would therefore exist.

Id. at 380-81 (emphasis added).

More importantly, the unanimous Supreme Court decision in *Kokkonen* also explicitly discussed a Rule 41(a)(1)(ii) order – like the present case. In that regard, this Court directed that:

> Even when, as occurred here, the dismissal is pursuant to Rule 41(a)(1)(ii) (which does not by its terms empower a district court to attach conditions to the parties' stipulation of dismissal) we think that the court is authorized to embody the settlement contract in its dismissal order (or, what has the same effect, retain jurisdiction over the settlement contract) if the parties agree.

Id. at 381-82.

In the present case, the third sentence of paragraph 6 of the settlement agreement explicitly requires that "a copy of this Settlement Agreement will be filed with the Court

along with the dismissal papers." (App. F). The parties effectuated this portion of the settlement agreement by both referring and attaching the settlement agreement to the 1992 Order.[3] Indeed, the 1992 Order states, in part, that it is "in accordance with the terms of the attached Settlement Agreement." (App. F).

Thus, contrary to the decision of the Second Circuit, the 1992 Order incorporates the agreement. Indeed, a court order is not required to use "incorporate" or any other "magic words" to accomplish its purpose. *See Interspiro USA Inc. v. Figgie Int'l Inc.*, 18 F.3d 927, 930 (Fed. Cir. 1994). Significantly, the language of the order in *Interspiro* ("pursuant to that agreement") closely mirrors the language in the subject 1992 Order ("in accordance with the terms of the attached settlement agreement").

In short, the specific reference to and attachment of the agreement legally serves to incorporate the agreement into the Order.[4] Moreover, this incorporation was confirmed by the district court judge (Chief Judge McAvoy) and both Hester and Tyson. See pages 4-5 of the Petition.

Finally, the 1992 Order -- via the second sentence of paragraph 6 of the settlement agreement -- expressly retains

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[3] Obviously, if all the parties wished to do was to dismiss the action without incorporation, then they would have agreed not to file the agreement with the court; they would have filed a Rule 41(a)(1)(ii) stipulation without any reference to that agreement, and they would not have submitted the 1992 Order with the attached agreement for Chief Judge McAvoy's review, approval and entry.

[4] To the extent that the Second Circuit rendered a *de novo* legal determination with respect to the issue of "incorporation" contrary to the decision of the district court, that decision may be reviewed by this Court *de novo*.

jurisdiction over the agreement. (Pet. at 74a). Although Tyson asserts that this paragraph provides jurisdiction only as to "specific performance," there is no language in the settlement agreement that states jurisdiction is to be so strictly limited. In addition, as recognized in *Kokkonen*, once a district court has jurisdiction over a matter, the "inherent power" of the court permits it to make contempt rulings. *See Kokkonen*, 511 U.S. at 379-80.

Third, Tyson's brief incorrectly attempts to equate an order under Rule 41 with the entry of an injunction under Rule 65, citing *International Longshoremen's Ass'n v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 75 (1967). However, that Rule 65 decision is not controlling here because it did not involve a Rule 41 order incorporating a settlement agreement.

More importantly, Rule 41(a)(1)(ii) orders are very different than orders for an injunction. Rule 41 orders are the result of a joint effort by all of the parties to resolve litigation. Thus, in the case of a Rule 41 order, the parties jointly draft the terms of the order, and, as a result, they fully understand its meaning and obligations. In contrast, Rule 65 orders involve disputed language that is frequently the subject of later argument.

The question presented in this Petition is an important one to the efficient administration of justice in the federal courts because Rule 41 provides a frequently used judicial vehicle by which parties and courts resolve lawsuits pursuant to the terms of settlement agreements. Quite often, parties do not want a judgment entered under Rule 54 or by consent judgment. In addition, they do not want the entry of an injunction or an order for injunctive relief.

In this regard, it is noted that the entry of a judgment, consent judgment, injunction or order for injunctive relief is frequently viewed as a determination that one party was the "loser" in the litigation. Significantly, Rule 41(a)(1)(ii) allows the parties to settle an action without any adverse "stigma." In other words, Rule 41 promotes settlement and the effective administration of the federal court system.

Here, both Hester and Tyson opted for the resolution of their prior dispute by the entry of a Rule 41 order (with the attachment and incorporation of the agreement), as opposed to the termination of the action pursuant to the entry of a consent judgment, a judgment, an injunction or an order for injunctive relief. They also deliberately decided not to terminate the action by a voluntary dismissal of the case by Hester alone. In other words, they decided to settle the case by the entry of a court order that referred to and attached the settlement agreement. They also agreed that the district court would retain jurisdiction over that agreement.

Although Tyson would have this Court believe that a Rule 41 order is a legal nullity, Hester respectfully submits that a Rule 41 order is an "order" of the court and that it should be treated like other court orders.

In other words, a violation of a Rule 41 order should be legally analyzed like any other violation of a court order – i.e., a violation of any court order (including a Rule 41 order) can give rise to a holding of contempt. A Rule 41 order (by its legal nature and name) is an order of the court; it is not merely a private contract.

Accordingly, Hester (like other Rule 41 order parties) is entitled ~~to have~~ the terms of the 1992 Order enforced by contempt because the parties agreed that the settlement

agreement would be a part of the Order, and they agreed that the district court would retain jurisdiction over the agreement.

Tyson and the Second Circuit have a fundamental misconception of the legal effect of a Rule 41 order. On the one hand, a Rule 41 order is not an injunction or order for injunctive relief under Rule 65. Likewise, it is not a judgment under Rule 54 or a consent judgment.

On the other hand, a Rule 41 order is a valid court order. Thus, the violation of a Rule 41 order (like any other court order) can result in a holding of contempt. For this reason, certiorari is proper in order to clarify the Second Circuit's fundamental misconception of Rule 41.

To further demonstrate the differences, Hester points out that Rule 41 does not require that the dismissal order be in the form of an injunction under Rule 65 or in the form of a judgment under Rule 54. Consequently, Rule 41 orders are not judgments, consent judgments, injunctions or orders for injunctive relief.[5]

For a scholarly discussion directly on this issue, Hester again respectfully directs this Court's attention to *In re Peck*, 155 B.R. 301, 306-07 (D. Conn. 1993) (Rule 65 not at issue in settlement agreement that was submitted per Rule 41). See also the decisions cited by Chief Judge McAvoy in

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[5] To the extent that Tyson relies upon the Tenth Circuit decision in *Consumers Gas & Oil, Inc. v. Farmland Indus., Inc.*, 84 F.2d 367 (10th Cir. 1996), to indicate that a Rule 41 order must comply with the provisions of Rule 65, this decision further shows the significance of the federal question presented in this Petition as well as the conflict between various circuit courts of appeal and this Court's decision in *Kokkonen*. In other words, *Consumers Gas* supports the grant of Hester's Petition.

support of his grant of partial summary judgment in the present case. *Hester Indus., Inc. v. Tyson Foods, Inc.*, No. 93-CV-391, 1994 WL 774553, at **2-3 (N.D.N.Y. Aug. 8, 1994).

Moreover, the unanimous decision of this Court in *Kokkonen* makes clear that a Rule 41 order need not be in the form of an injunction because, for example, even in the absence of an injunction, the retention of jurisdiction or the incorporation of a settlement agreement will give rise to contempt sanctions if the terms of a settlement agreement are violated. *See Kokkonen,* 511 U.S. at 381.

Thus, the agreement of the parties in this case that there would be no entry of either a judgment, injunction or order for injunctive relief does not bar the enforcement of a Rule 41 order via contempt under *Kokkonen*. Here, the wording of the agreement evidences a clear intention that the parties wanted the case settled by an enforceable Rule 41 order (see the second and third sentences of paragraph 6 of that agreement), but without the entry of judgment, an injunction or injunctive relief. (App. F).

In this connection, the Seventh Circuit recently indicated (after citing *Kokkonen*) that violation of a court order incorporating a settlement or retaining jurisdiction to enforce the settlement would constitute contempt. *See Lucille v. City of Chicago*, 31 F.3d 546, 548 (7th Cir. 1994) ("flout the court's order"). In this connection, the court stated:

> [T]he court also possesses jurisdiction if the judgment implicitly incorporates the terms of a settlement that itself provides for continuing jurisdiction.

Id. (citation omitted) (emphasis added). The fact that a settlement agreement may be "implicitly incorporated" (i.e., incorporated by reference or attachment) shows that compliance with Rule 65 is not required with respect to a Rule 41 order of dismissal. *See also Futernick v. Sumpter Township*, 78 F.3d 1051, 1055 n.4 (6th Cir. 1996) (citing *Kokkonen* and holding that plaintiff "may not be able to seek contempt sanctions against the Township immediately, as he would have been able to had the district court retained jurisdiction or incorporated the settlement agreement into the order of dismissal").

As noted above, *Kokkonen* expressly indicates that the existence of a provision "'retaining jurisdiction' over the settlement agreement" is sufficient alone to give rise to a contempt finding if the terms of the settlement agreement were violated. *Kokkonen*, 511 U.S. at 381. Significantly, Kokkonen does not also require the entry of a Rule 65 order to effectuate the retention of jurisdiction.

Here, the second sentence of paragraph 6 of the settlement agreement expressly provides that the court maintained jurisdiction over the enforcement of the settlement agreement. (App. F). *See also Lee v. Runyan*, 18 F. Supp. 2d 649, 653 (E.D. Tex. 1998) (where the record showed that court reviewed the settlement agreement, and where dismissal order specifically mentioned that agreement, the court had jurisdiction over any enforcement action, because the agreement -- but not the dismissal order -- expressly provided for this jurisdiction).

By making the retention of jurisdiction a part of the 1992 Order according to the attached settlement agreement, that settlement agreement ceased to be merely "a private

contract." Instead, that agreement became a part of the district court's Order and its violation gave rise to contempt.[6]

In conclusion, Hester submits that its Petition presents an important federal question and that the decision of the Second Circuit is contrary to both this Court's decision in *Kokkonen* and to the decisions of courts of appeal in the Sixth (*Futernick*), Seventh (*Lucille*) and Federal Circuits (*Interspiro*).

Respectfully submitted,

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[6] On page 11, Tyson cites to then-Circuit Judge Breyer's observation in *NBA Properties, Inc. v. Gold*, 895 F.2d 30, 34 (1st Cir. 1990), that violation of "a private contract" settling a case does not impose contempt liability. However, in its quotation of the case, Tyson omits the language that states "But the Decree does not incorporate the contract or this language. It simply does not refer to it." *Id.* In contrast, the 1992 Order attaches, refers to and incorporates the settlement agreement.